86-164 (1)

No. -

Supreme Court, U.S.
FILED
JUN 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NELLA LOPER CRABTREE

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

---

CRIMINAL CASE

ROBERT F. CLARK
Post Office Box 2705
Mobile, Alabama 36652
(205) 433-5860

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

3 1/4

QUESTIONS PRESENTED

I. Did agents of the United States Government enter and search the homeplace of petitioner without a search warrant, without her consent and on an occasion when exigent circumstances did not exist so that the fruits of the search should not have been admitted into evidence at her trial.

II. Did agents of the Government of the United States search a motor vehicle located behind petitioner's house inside the curtilage and on her property without a search warrant, without her consent and on an occasion when exigent circumstances did not exist so that the fruits of the search should not have been admitted into evidence at her trial.

LIST OF PARTIES TO THE PROCEEDING

Nella Loper Crabtree

Richard Wayne Nolan

Sharon Melinda Dueitt

Darryl Lee Raley

United States of America

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OPINIONS BELOW

Petitioner was convicted in a jury trial in the United States District Court for the Southern District of Alabama, Southern Division on April 24, 1985, case number 85-0036. Her conviction was confirmed by the Eleventh Circuit Court of Appeals on March 10, 1986, without opinion on March 10, 1986. *United States v. Crabtree,* Fed.2d (1986) (Docket No. 85-7361). A petition for rehearing was denied by the Eleventh Circuit on April 14, 1986.

JURISDICTION

Petitioner was convicted on April 24, 1985. The Eleventh Circuit Court of Appeals affirmed the conviction on March 10, 1986. A petition for re-hearing was denied by the Eleventh Circuit on ~~March 10~~, April 14, 1986. The jurisdiction of this Court is invoked under 28 USC §1257(3) and Rule 17.1(a) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

Amendment Four, United States Constitution, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

> "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with witnesses against him."

STATEMENT OF THE CASE

(A) Proceedings Below

Petitioner was indicted by a grand jury in the Southern District of Alabama in March of 1985 for one count of knowingly and intentionally possessing with intent to distribute approximately 110 pounds of Marijuana in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 (R 1). The defendant filed a motion to suppress evidence seized in the house and motor vehicle behind her house, which motion was denied immediately preceeding the trial (T 240). At the conclusion of the trial, petitioner was found guilty and sentenced to a period of three years in prison with a special probation term of five years and fined $5,000.00.

Petitioner filed a motion of appeal on May 28, 1985. The Eleventh Circuit Court of Appeals affirmed petitioner's conviction on March 10, 19085. A petition for rehearing was denied by The Eleventh Circuit on March 10, 1986. On March 24, 1986, a Rule 25 decision was issued as an for the mandate.

(B) Facts Material To Consideration Of The Questions Presented

In late January of 1985, Drug Enforcement Administration agents of the United STates Department of Justice received information from Juanita Sanchez, who had recently been arrested in Mississippi that she and two other individuals had come to Mobile, Alabama with a kilogram of Heroin and went to the

residence of petitioner. The following morning, they returned to petitioner's residence and picked up two bales of Marijuana and $38,00.00 in cash. The agents were told that the Marijuana came from a truck located behind petitioner's residence. Ms. Sanchez accompanied the agents to the street where petitioner lived and pointed out petitioner's house to the agents. Two agents were left in the area to conduct surveillance while another agent went back to downtown Mobile to attempt to obtain a search warrant. The agents conducting surveillance were approached by two individuals in the neighborhood regarding their presence. The agents made up a story as to their presence in the neighborhood. The two individuals then drove to a housetrailer located down the road from petitioner's home. This contact was reported to the agent who had gone to obtain a search warrant, and he decided to go out and "secure the residence prior to getting the search warrant to assure that no evidence would be destroyed." (T 15).

He and several officers then went to the residence and drove up in the driveway. When he did so, he observed a quantity of smoke coming from the chimney of the house and detected a strong odor of burning Marijuana (T 18). He and an officer of the Mobile County Police Department approached a door of the house. Petitioner came to the door and the agent "told her I was a Federal Agent, I would like to come in and speak with her, and she said, I want to see some identification. At that time, I put my badge up to the window of the house, and she opened the door" (T 19). The agent further testified "she never said come in or anything like that," but "she stepped back. I said, may I come in and speak with you, and

she opened the door and stepped back and I walked in" (T 39). The Sheriff's Department officer with the agent was dressed in a black or olive drab uniform and wearing a beret and combat boots (T 38). He also had a Carbine which he held across his chest at an angle (T 25).

After obtaining entry to the house, some six to eight law enforcement agents conducted a search of the house "to secure our safety". They discovered a pile of burning Marijuana in the fireplace, a set of scales, some ziplock type bags and a heat sealer in a bedroom (T 20).

One of the agents then went into the back yard of the residence to a disabled motor vehicle located fifty feet from the residence. He shined his flashlight into the motor vehicle and observed what appeared to him to be a bale of Marijuana and a number of garbage bags containing Marijuana (T 21).

The agent in charge acknowledged on cross examination that he had made a decision to search and secure the residence without a warrant prior to the time he arrived at the residence based on the smoke and smell coming from the chimney and information he had been given by an informant (T 34). He had no information to believe that anyone was in the motor vehicle behind the house (T 36). He also agreed that there was no reason he could not have communicated with the Magistrate by telephone or radio during the forty or fifty minutes between the time he decided to search and secure the house and the time the house was entered (T 36).

Based on these facts, the trial court determined that the agents had every reason to believe that Mar-

ijuana was being burned in the residence and that evidence was therefore being destroyed. The agent, therefore, had the right to present his badge and ask permission to enter the home. The court found that he did so and that petitioner "either expressly or impliedly gave him permission to enter after he showed his identification." The court also determined that it was reasonable for the agent to look into the van for people at which time he saw Marijuana within the van in plain view (T 222).

The petitioner had earlier testified that she was in bed asleep at 11:15 P.M. when she heard her dog barking. She went toward her kitchen window and saw "a man with a big gun" and another man standing at her patio door. The man with the gun was dressed in what she called drab green army fatigues (T 565). The men said "open up, police." The man with the gun made a gesture and she asked to see a badge which was showed her through the window. She opened the door and the men came in waving the gun and told her and another occupant of her residence to sit down (T 566). One of the men asked her if it was her house, and she told him it was, at which time she and the other occupant were placed under arrest (T 567).

DISTRICT COURT'S BASIS OF JURISDICTION

The District Court had jurisdiction because Petitioner was indicted for a violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2.

ARGUMENT FOR ALLOWANCE OF WRIT

1. By refusing to reverse Petitioner's conviction based on evidence seized during a night time war-

rantless search of Petitioner's home, The Eleventh Circuit Court of Appeals has ignored the Fourth Amendment to the United States Constitution. Taken in the light most favorable to the Government, the evidence established that two law enforcement officials, one wearing combat fatigues and carrying a Carbine, knocked on Petitioner's door and told her they wanted to "talk with her". She opened the door and the agents walked in. If opening a door in response to a law enforcement officer's request to talk can be construed as consent to searching one's home, the trial court should have at least made a finding that the consent was voluntarily and freely given. However, opening one's door in the face of such authority in the middle of the night should not be considered consent to search a home as a matter of law.

A warrantless search of a house, particularly during the night, is per se unreasonable. *Katz v. United States*, 389 U.S. 337 (1967). Even if circumstances justify one of the exceptions to a warrantless search, there must be a showing that a warrant could not practicably be obtained. *Vale v. Louisiana*, 399 U.S. 30 (1970). A telephonic search warrant was readily obtainable and could have been obtained almost immediately had there been probable cause under Rule 43(c)2 of the Federal Rules of Criminal Procedure.

The burden of proof is on the Government to show that a warrantless search or entry falls within an emergency or exigency situation. The facts in this case completely negate such an exception to the requirement for a warrant. Entry into Petitioner's house was not attempted until 45 or 50 minutes after a decision had been made to do so. If there was some concern about the destruction of evidence, the agents

on the scene would have entered the house immediately rather than waiting 45 or 50 minutes for the agent in charge to reach the scene from downtown Mobile. A telephonic search warrant could have been obtained while the agent in charge was in route to the scene since a Magistrate was standing by.

In cases involving warrantless searches of homes, there must be a weighing of the gravity of the public concerns served by the search, the degree to which the search advances the public interest and the severity of the interference with the individual's liberty. *Brown v. Texas,* 433 U.S. 47 (1979). The agents had information that Marijuana was kept in a vehicle behind Petitioner's house. The vehicle was under surveillance and no testimony indicated that anyone was making any effort to destroy evidence in the motor vehicel. The 9th Circuit Court of Appeals has held that the strong smell of a substance does not provide probable cause for a warrantless entry. *U.S. v. Tate,* 694 Fed.2d 1217 (9th Cir. 1982). Clearly, there was no exigent circumstance demonstrated which required a warrantless entry into Petitioner's home.

The Government contends that Petitioner consented to a search of her home which led to her arrest and the Marijuana found in the fireplace. Taken in a light most favorable to the Government, the consent consisted of her opening the door when she was confronted by two agents, one of whom flashed a badge and another held a rifle. It is significant to note that the agent did not even ask for permission to enter her house or search it. He merely told her he would like to talk with her. She opened the door and the agents rushed in. While it is unlikely in the first place that a person burning Marijuana in a fireplace in plain

view from a doorway entrance would consent to a search, the Government bears the burden of establishing that the consent was given voluntarily. *Amos v. United States,* 255 U.S. 313 (1921). In determining whether or not consent was given, courts have looked to the totality of the circumstances surrounding the consent. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). Among the facts that should be considered are whether or not the individual giving the consent is advised of his right to refuse the request, whether or not it is in fact a search to which one consents (as opposed in this case to a conversation), whether or not the consent is in fact freely given or merely "acquiescence to a claim of lawful authority" *Bumper v. North Carolina,* 391 U.S. 533 (1968).

In this case, the trial court never made a specific finding that Petitioner freely consented to a search as is required by law. *People v. Rios,* 546 P.2d (Ca. 1976). In fact, there is no evidence that Petitioner did anything other than open her door when the agents asked to talk with her. Testimony of the agents themselves make it clear that at least they did not believe at the time they had been given consent to search the house. They testified that they merely "walked through the residence to make sure that it was secure for our safety."

The Fourth Amendment simply was not complied with in this case. Opportunity existed for the agents to obtain a search warrant, but the elected to proceed on Petitioner's consent built on flimsy suppositions flying the face of the hard facts. Petitioner's Fourth Amendment rights have been completely ignored with respect to the search of her residence in the proceedings below.

The search of the motor vehicle behind Petitioner's home was an even more flagrant disregard for Petitioner's rights. At the time the motor vehicle was searched, Petitioner had been arrested in her home. Obviously, the motor vehicle was not an area assessible to her and could not be searched pursuant to the arrest. *New York v. Belton,* 453 U.S. 454 (1981); *U.S. v. Robinson,* 414 U.S. 218 (1973). If opening one's door in response to a request by law enforcement officers to talk does constitute consent to search a home, that consent cannot be construed to constitute consent to search a disabled van located 50 feet away from the house in the back yard. In *U.S. v. Dichiarinte,* 445 F.2d 126 (7th Cir. 1971), the police obtained consent to search the defendant's house for narcotics. During their search, they examined private papers they found. The court held the search invalid insofar as the papers seized were concerned.

There is no evidence whatsoever of any consent to search outside the home. There is no evidence whatsoever that there was any emergency or exigency involving the search of the disabled motor vehicle behind the Petitioner's home. The motor vehicle was under surveillance and could not move. The failure of the officers to obtain a warrant prior to searching it is inexcusable and a flagrant disregard of Petitioner's Fourth Amendment rights.

It is important to realize that suppression of the material found in the motor vehicle is important even if it were determined that the material found in the home could be used in evidence. The small amount of Marijuana found burning in the fireplace was the only evidence seized in the home which was used against Petitioner. The exact quantity was never es-

tablished. However, a large amount of Marijuana was found in the van. It too was used against Petitioner at her trial. The only evidence that Petitioner possessed Marijuana for sale was the quantity of the Marijuana itself. Thus, if the evidence found in the disabled motor vehicle had been excluded, there would have been no evidence that Petitioner possessed Marijuana for sale. She could easily have been convicted only of possession of Marijuana for personal use.

While the procedure used by the Government in searching Petitioner's home and property did result in the seizure of a quantity of Marijuana in retrospect, the procedures undoubtedly violated Petitioner's Fourth Amendment rights. The very essence of the Fourth Amendment precludes the authoritative knock on the door in the middle of the night by uniformed officers of the State. If the Fourth Amendment to our Constitution is to ever be applied to prevent that knock on the door in the middle of the night, it must be applied to the facts raised by Petitioner in this case. If it does not apply to Petitioner, it simply has no application.

CONCLUSION

Wherefore, the premises considered, Petitioner respectfully moves this Court to grant her petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

ROBERT F. CLARK
Attorney for Petitioner
Post Office Box 2705
Mobile, Alabama 36652
(205) 433-5860

CERTIFICATE OF SERVICE

STATE OF ALABAMA

COUNTY OF MOBILE

Before me the undersigned authority, in and for said State and County, personally appeared Robert F. Clark, who being known to be and by me being first duly sworn did depose on oath and say as follows:

1. My name is Robert F. Clark. I am an attorney at law, licensed to practice before the Supreme Court for the State of Alabama and The United States Supreme Court. I was admitted to practice before the United States Supreme Court on September 15, 1978. I have personal knowledge of the matters contained herein. I certify that on the 19th day of June, 1986, I did serve the requisite number of copies of the foregoing to the Clerk of The United States Supreme Court and the Solicitor General, Department of Justice, Washington, D. C. 20530, by placing a copy of the same in the United States Mail, properly addressed and first class postage prepaid.

/s/ROBERT F. CLARK
Robert F. Clark

CERTIFICATE PURSUANT TO RULE 28.4(b)

Petitioner gives notice that 28 U.S.C. §2403(a) may be applicable in that Petitioner is questioning the constitutionality of an act of Congress, specifically Rule 801(d)(2)(E), Public Law 93-595, 88 stat. 1926, and that a copy of the petition has been served on the Solicitor General of the United States.

ROBERT F. CLARK

APPENDIX

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

Criminal No. 85-00036

UNITED STATES OF AMERICA
v.

NELLA LOPER CRABTREE,
RICHARD WAYNE NOLEN,
SHARRON MELINDA DUEITT, and
DARRELL LEE RALEY

The Grand Jury charges:

Filed
MAR 8 1985

COUNT ONE

On or about the 30th day of January, 1985, in the Southern District of Alabama, Southern Division, NELLA LOPER CRABTREE and RICHARD WAYNE NOLEN knowingly and intentionally did unlawfully possess with intent to distribute approximately 110 pounds of marijuana, a Schedule I controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT TWO

On or about the 30th day of January, 1985, in the Southern District of Alabama, Southern Division, DARRELL LEE RALEY knowingly and intentionally did unlawfully possess with intent to distribute approximately one-half pound of marijuana, a Schedule I controlled substance; in

violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT THREE

On or about the 30th day of January, 1985, in the Southern District of Alabama, Southern Division, RICHARD WAYNE NOLEN and SHARRON MELINDA DUEITT knowingly and intentionally did unlawfully possess with intent to distribute approximately six ounces of cocaine hydrochloride, a Schedule II controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FOUR

On or about the 30th day of January, 1985, in the Southern District of Alabama, Southern Division, RICHARD WAYNE NOLEN and SHARRON MELINDA DUEITT knowingly and intentionally did unlawfully possess with intent to distribute approximately 89 tablets of Preludin (phenmetrazine hydrochloride), a Schedule II controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT FIVE

On or about the 30th day of January, 1985, in the Southern District of Alabama, Southern Division, RICHARD WAYNE NOLEN and SHARRON MELINDA DUEITT knowingly and intentionally did unlawfully possess with intent to distribute approximately one and one-third pounds of marijuana, a Schedule I controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

A TRUE BILL

/s/Morris Lee McKee

MORRIS LEE MCKEE
FOREMAN, UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF ALABAMA

/s/J. B. Sessions, III
J. B. SESSIONS, III
UNITED STATES ATTORNEY

March, 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7361
Non-Argument Calendar

D.C. Docket 85-00036

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

NELLA LOPER CRABTREE,
SHARRON MELINDA DUEITT,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Alabama

(March 10, 1986)

Before TJOFLAT, VANCE and KRAVITCH, Circuit Judges.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

Judgement Entered: March 10, 1986
For the Court: Spencer D. Mercer, Clerk

By: /s/_____
Deputy Clerk

ISSUED AS MANDATE: APR 22 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

Criminal No. 85-0032

UNITED STATES OF AMERICA
vs.

NELLA LOPER CRABTREE

MOTION TO SUPPRESS EVIDENCE

Comes now the defendant in the above styled matter, by and through his attorney, and moves this Court to suppress as evidence any and all items seized, test results concerning items seized, testimony or statements made about any of the foregoing, and any testimony regarding any observations made of defendant's person while defendant was under arrest that is intended to be used against the defendant and that are now being held by the United States Attorney's office, and as grounds therefore, would show as follows:

1. That the articles which the United States Attorney intends to use against defendant were obtained pursuant to an unlawful search and seizure by members of the Drug Enforcement Administration, Mobile Police Department, Mobile County Sheriff's Office or any other law enforcement agency.

2. That search and seizure were made without authority and without a search warrant.

3. Defendant's arrest was made without warrant and without authority and without probable cause to believe that a felony had been committed, and that the defendant

had committed it, and therefore, the search and seizure were not made incident to a lawful arrest.

4. That warrant for defendant's arrest was issued without a judicial officer first being supplied with sufficient information to support an independent finding that probable cause to arrest existed and therefore, the items seized subsequent to that arrest should be suppressed.

5. The complaint upon which the warrant for defendant's arrest was based could not support an independent finding of probable cause to arrest made by a judge. Consequently, the arrest of defendant was made without probable cause and the items seized should be suppressed.

6. There is no evidence that the seized items had been used or about to be used in any way upon which this criminal charge could arise.

7. The defendant did not violate any law, either misdeameanor or felong, in the presence of the officers which would warrant the arrest.

8. There did not surround the seizure of these items exigent circumstances that justified a warrantless search and seizure.

9. The items seized were not in plain view when seized by police officer.

10. The defendant's behavior did not give police officers reasonable suspicion that criminal activity was afoot, and therefore did not justify the subsequent search and seizure.

11. Said search and seizure violated defendant's rights under Article One, §5, 6 and 7 of the Constitution of Alabama, and the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

WHEREFORE, the defendant prays that this Court suppress the above articles now being held by the United States Attorney's office.

/s/ Robert F. Clark
ROBERT F. CLARK
Attorney for Defendant

CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 14th day of March, 1984 served a copy of the foregoing pleading on the United States Attorney for the Southern District of Alabama by hand delivering same to his office.

/s/ Robert Clark
ROBERT CLARK

MORNING SESSION

APRIL 23, 1985

9:00 a.m.

THE COURT: As I understand it, the only evidence the government, at this point, seeks to offer, relative to the van, is what the officer saw when he shined his flashlight through the window; is that correct?

MR. MILLING: Your Honor, there will also be a sample drawn from the alleged hundred and eight pounds of marijuana taken out of there, and there will be photographs of those bales. And there were, bags, bales and boxes.

THE COURT: Your position is that, having seen it, they had a right then to proceed to search without a warrant?

MR. MILLING: Yes, sir, plain view.

THE COURT: Well, on these various matters, the facts are, I think, essentially without dispute. There is some dispute. I am going to undertake to make some findings.

After I conclude that, if there are matters that you feel are disputed, which means to be the subject of expressed findings, if you will let me know, I will undertake to make those findings.

First, with reference to the search of the Crabtree home, it is without dispute that the Drug Enforcement Administration agents had information to the effect that there were controlled substances located in that home, including marijuana, and that they undertook a surveillance of the home.

That, at some point after they undertook their surveillance, their cover was blown, so to speak, when the pickup truck, the four wheel drive truck, drove up to the car in which they were located and, thereafter, that truck went

by the Crabtree home for some brief period of time, apparently, before pulling off.

The court is of the opinion that Agent Krusko, at that time he pulled in the driveway of the Crabtree home, had the right to do that, at least for the purpose of seeking consent to enter the home.

Whether or not he intended to enter the home without consent, it is obvious that at least one of his purposes was to see if he could get consent to enter the home, because he asked for consent to enter the home.

After pulling in the driveway, Agent Krusko smelled marijuana burning, saw smoke coming from the fireplace. At that point in time, he had every reason to believe that marijuana was burning in the residence. Reason to believe that evidence was, in fact, being destroyed, at that moment, by fire and, at that point, he had, in the court's opinion, at least the right to present his badge and ask permission to enter the home.

The court finds that he did present his identification and asked permission to enter the home to talk with Mrs. Crabtree, that she either expressly or impliedly gave him permission to enter after he showed his identification.

The court is not in a position to make any findings relative to Mrs. Crabtree's perception of that. There is no testimony from which I can find who she may have seen other than Agent Krusko.

There is no testimony from which I can find how many police vehicles she may have seen. A member of the SWAT team with a carbine was with Agent Krusko. At that time, his location was such that she certainly could have seen him. Whether she did or not, I have no way of knowing.

After entering the Crabtree home, Agent Krusko saw marijuana burning in the fireplace, smelled it burning and, thereafter, arrested the occupants of the home.

I think, incident to that arrest, that he had the right to search for people in that home. The information that he had received previously included information that there were automatic weapons in that home.

There is no evidence that he made any search in the house, which is not reasonable in terms of looking for people in the house. The only paraphernalia and drugs which he was testified he saw were in plain view in the house.

Insofar as the van is concerned, I think it was reasonable for Officer Krusko to look in the van for people. It was located fifty feet, more or less, from the rear door of the residence. There is no testimony from which I can find that it was apparent, from the back door, that the van was inoperable. Upon shining his flashlight in the van, the marijuana was in plain view.

Now, insofar as the search of the briefcase and suitcase is concerned, the court finds that Mr. Nolen and Mr. Crabtree were detained and questioned, that there was a reasonable suspicion which gave them the right to briefly detain and question Mr. Nolen and Mr. Crabtree and that the vehicle in which they were located had, shortly before, been by the Crabtree home, after which it went by the Crabtree trailer and, at the time the officers approached it, it was driving into the woods.

Both Mr. Crabtree Jr. and Mr. Nolen were detained, frisked and questioned briefly by the officers. I am unable to find exactly how long a period of time that was. It was certainly less than thirty minutes.

During a portion of that time, another officer or officers were making a search in the woods to see if anyone was out in the woods.

With reference to the briefcase and suitcase, both Mr. Crabtree and Mr. Nolen were asked by Agent Lamplugh whether or not they had any objection to this opening the

briefcase and the suitcase, and they advised him that it didn't belong to either of them and they had no objection to it.

I find that neither Mr. Crabtree, Jr. nor Mr. Nolen were arrested prior to the time they were asked whether or not they had any objection to the opening of the briefcase or suitcase.

As I have said, I do not think the detention, under those circumstances, was illegal, the brief detention, questioning and frisking.

Insofar as the trailer is concerned, I find that Mr. Crabtree, Jr. had been told, prior to the time he was asked to consent to the search of the trailer, that he was not under arrest and that he understood that the officers were asking for his consent to search the trailer.

That he understood that the alternative to his giving consent was that they would have to get a search warrant and that he voluntarily gave his consent to the search of the trailer, which was his trailer, where he lived with his wife.

Insofar as Mrs. Dueitt is concerned, she is not shown to have had any expectation of privacy in the suitcase or briefcase which was located outside the trailer near the parked car. Doesn't claim ownership of it.

Insofar as the statement, made by Mr. Nolen at the scene, is concerned, and thereafter, at the offices of the Drug Enforcement Administration, the court finds that Mr. Nolen was advised of his Miranda rights by John Pigott, that he was arrested only after he claimed ownership of the drugs which were found in the suitcase and briefcase and that he was then informed of his Miranda rights and that he voluntarily made the statement that he made on that occasion and that, in fact, he seemed to be anxious to assume the entire responsibility for the controlled substances that were found at the scene.

Insofar as the statement made at the Crabtree home is concerned, by Mr. Raley, the court finds that the statement was not one made in response to any custodial interrogation, that it was a spontaneous statement made in response to a comment by the officer relative to the volume of marijuana in the fireplace, that it was not a statement made in response to any question, custodial or otherwise, that it was voluntary, and that there is no Miranda violation insofar as that statement is concerned.

Now, are there additional facts which any of the parties feel are disputed, as to which you feel you want the court to make a finding?

MR. CLARK: Judge, with regard to Mrs. Crabtree, I would ask the court to make a finding with regard to when the decision was made by Agent Krusko to search the house.

My understanding of the testimony, he said he was at DEA headquarters—on cross-examination, he said he was at DEA headquarters when he received the call from the field agents that the cover had been blown, or that someone knew that they were there, and it was at that point that he made the decision to search the Crabtree house.

I believe that was his testimony with regard to the search. I don't believe he went on to the curtilage.

His statement of mind was not extra circumstances—it was to go search, at that point.

In addition, your Honor, with regard to the finding that she expressly or impliedly permitted the search, I thought the undisputed testimony was that she said nothing. I don't think there was any expression, at least no verbal expression, one way or the other.

THE COURT: She opened the door.

MR. CLARK: Yes, sir, but I think, under the circumstances, where some federal agent shows a badge in your

window, I don't think the average citizen, at that point, is going to stand there and let them kick the door down.

I don't think there is anything in the record that says what her state of mind was. She did not make any verbal response. All she did was open the door.

THE COURT: Okay, I am unable to make any finding that she did make a verbal response. I do find that she opened the door in a way which the officer understood as giving him permission to enter.

MR. CLARK: Yes, sir.

THE COURT: Now, as to the decision on the part of Officer Krusko. As I understand the testimony, he made the decision that he would go in the house, with or without consent, after the cover was blown, but you want me to find exactly what time of the night?

MR. CLARK: Yes, sir. It is my understanding that he made it at the DEA headquarters to go in the house.

I was asking him about having conversations with the magistrate. He said the decision was made at that time.

THE COURT: The decision was made after the agent, who was conducting the surveillance, was approached by Nolen and Crabtree Jr. in the four wheel drive truck. Exactly what time of night that was, I am not sure I can find.

MR CLARK: Yes, sir. What I am saying is—I am trying to get at the location of Agent Krusko, at that point.

I believe they notified him—the two agents that were out in the field, Lamplugh and Tidwell, notified Agent Krusko at DEA headquarters.

THE COURT: My recollection is that he had gone to DEA headquarters for the purpose of preparing the affidavit for a search warrant, and was there at the time that he was informed by the agents that their cover had been

blown, so to speak, and he then made the decision to go in without a warrant.

MR CLARK: Yes, sir. That is the decision I was asking for.

In addition, the van, I believe Agent Krusko said he was not looking for anyone in the van. He was searching the van. He was not looking for people at that specific point in time.

I asked him specifically about having looked at the van. I believe his testimony was that it appeared that it had not been moved in some time and that he was not looking for people when he searched the van.

THE COURT: Well, his conclusion that it had not been moved for some time was apparently made after closer inspection of the van, however.

I did not understand that he discerned, from the rear of the house, that it had not been moved for some time.

MR. CLARK: Well, I thought he had. I thought when he looked at the van he could tell that it had not been moved by looking at it.

THE COURT: Well, that conclusion was based, in part, as I recall, upon his observation that the pistons were rusty. I don't think he could see that from the back door, do you?

MR. CLARK: No, sir, judge. But you could tell, by the condition of the van, and I assume he could tell, by the condition of the van, that it had not been moved. It had been sitting there for some time.

THE COURT: I am unable to make a finding that he could tell that from the rear of the house. The area was not lighted, as I recall. I am unable to find that he could tell from the rear of the house that the van had not been moved.

MR. CLARK: Yes, sir. I will ask your Honor to make a finding with regard to his testimony that he was not looking for people when he was looking in that van.

THE COURT: Well, I don't recall what he said on that. Is that what he said, Mr. Milling?

MR. MILLING: Your Honor, special Agent Krusko said that he had no information, I believe, in answer to a question from Mr. Clark, that he had no information that any people were out there, but I believe his testimony was that—and the testimony was, that there were four—four, that they had been told were there from the informant and he had been told to search the place to look for people.

THE COURT: Well, I will find that he had information that there were some—several people in the house. He didn't know how many people were there.

I will find, if this is what you are asking me to find, that he had no information that there were people in the van.

MR. CLARK: Yes, sir.

THE COURT: But I think it was reasonable, and I find it was reasonable, to make a look for people in the van, under these circumstances.

These circumstances, including the fact that he didn't know how many people were in the residence at the time they drove up, that he had information that there were automatic weapons in the residence and it was nighttime. I think it was reasonable for him to look for people in the van.

MR. CLARK: Yes, sir.

MR. MILLING: Your Honor, with reference to the van. If your Honor recalls the testimony, I believe, when I called special Agent Krusko back to the stand, he also testified that as he approached the van he smelled marijuana and that the back door was not totally closed shut.

It would not totally close and—it was touching, if your Honor could make that additional finding. As he approached the van he also smelled marijuana.

THE COURT: I will find marijuana—as he approached the van, he smelled marijuana.

MR. MILLING: With reference to his testimony, the decision as to when, and what his decision was back at headquarters.

I believe his testimony was that he made the decision to secure the residence, and I think, on cross-examination, he stated that that meant to go in and secure the people and the premises until he could get a search warrant in order to search for other evidence. I believe, before it was said, he made the decision to go in and search.

THE COURT: Well, I didn't mean to say that. I think he had made the decision to go into that residence with or without permission.

MR. MILLING: To secure it, yes, sir.

THE COURT: To secure it. I also think, however, as he drove up the driveway, at least one of his purposes was to see if he could get consent to enter the residence, and I do not think, at the point he drove into the driveway, he had violated anybody's constitutional rights.

After he drove in the driveway and smelled the marijuana and had reason to believe that evidence was being destroyed, I think he had, at least, the right to use the badge of his office to see if he could get permission to enter the residence. That is what he did.

MR. MILLING: Your Honor, it was also the government's position when he got out of the car and saw the smoke billowing up out of the chimney and smelled the marijuana, that extenuating circumstances, even absent a consent, in order to keep the evidence that was burning—

appeared to him to be obviously going up the chimney, he would have had the right to go into the residence.

THE COURT: Well, certainly those were extenuating circumstances, in my opinion, the fact that evidence was being destroyed.

I think all I have to decide is that he had the right to use the badge of his office, at least to see if he could get consent to enter the residence, and that is what he did.

MR. MILLING: All right, sir.

MR. DEEN: Judge, after the search of the trailer, we would ask for a finding of fact that, at the time the consent was asked of Mr. Crabtree, that